SUPREME COURT, U. S.

NOV 21 1969

JOHN F. DAVIS, CLERK

No. 737

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, APPELLANT

v.

PAUL OGER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The order of the district court dismissing the indictment (Appendix, *infra*, p. 9) is unreported. The order of the court of appeals certifying the appeal to this Court (Appendix, *infra*, pp. 7–8) is similarly unreported.

JURISDICTION

On June 23, 1969, the district court entered an order dismissing the indictment against appellee on the ground that prosecution was barred by his assertion of the privilege against self-incrimination (see *United States* v. *Covington*, 395 U.S. 57). On July 22, 1969, notice of appeal to the United States Court of Appeals for the Seventh Circuit was filed in the

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district court. On October 9, 1969, the court of appeals, on motion of the government, ordered the case certified to this Court.

18 U.S.C. 3731 confers on this Court jurisdiction to review, on direct appeal, a judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

QUESTION PRESENTED

Whether an individual charged with violating 26 U.S.C. 4742(a) by transferring marihuana without receipt of a written order form can properly assert the privilege against self-incrimination as a complete defense to prosecution.

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. 4742(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4744(a) provides:

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or

concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

Other pertinent statutes and regulations are set forth in the Brief for the United States in *Buie* v. *United States*, No. 271, this Term, which is presently *sub judice*.

STATEMENT

A two-count indictment filed in the United States District Court for the Southern District of Indiana charged appellee with transferring marihuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a) (Count 1) and acquiring marihuana without paying the prescribed transfer tax, in violation of 26 U.S.C. 4744(a) (Count 2). Appellee moved to dismiss both counts, asserting that, as to him, the statutory scheme of the Marihuana Tax Act presented substantial hazards of self-incrimination. While that motion was pending, this Court, on May 19, 1969, decided *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57. Those cases held that, as to prosecutions under Section 4744(a), timely assertion of the privilege against self-incrimination provided a complete defense to prosecu-

tion under that section. On June 23, 1969, the district court in the instant case, relying upon *Leary*,[1] dismissed both counts of the indictment.

THE QUESTION IS SUBSTANTIAL

The government does not oppose the dismissal of Count 2 of the indictment, in light of the holding of *Leary* and *Covington*. However, in deciding that the rationale of *Leary* and *Covington* is equally applicable to prosecutions under Section 4742(a), the district court has resolved a question presently before this Court in *Buie* v. *United States*, No. 271, this Term, and in a manner directly in conflict with the decision of the Second Circuit in that case.

As we argue fully in our brief in *Buie*, on which we rely here, compliance with Section 4742(a) does not require a transferor of marihuana himself to disclose any information at all: the statute merely forbids him from making a transfer unless the transferee produces an order form which he has obtained from the Secretary of the Treasury. The fact that the *transferee* must disclose the name and address of the prospective transferor in order to secure the order form does not impose any self-incriminatory obligation upon the *transferor*. Nothing in the statutory scheme requires the transferee to obtain the necessary information from the transferor, and there is no basis for an assumption that such information

[1] It would, of course, have been more appropriate for the district court to rely upon *Covington*.

can be obtained only from the transferor. At all events, this Court's decision in *Buie* will be controlling as to Count 1 in the instant case.

CONCLUSION

For the reasons stated, it is respectfully submitted that judgment should be entered as to Count 1 of the indictment in accordance with this Court's disposition in *Buie* v. *United States, supra.*

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

NOVEMBER 1969.

APPENDIX

United States Court of Appeals for the Seventh Circuit, Chicago, Ill.

Thursday, October 9, 1969

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

No. 17883

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

PAUL OGLE, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Order

This matter comes before the court on motion of the government to certify the case to the Supreme Court under 18 U.S.C. § 3731. The district court dismissed the indictment charging defendant with violation of 26 U.S.C. § 4742(a) and 26 U.S.C. § 4744 (a)(1) because the statutes as applied to this defendant denied him his right against self incrimination and are therefore unconstitutional. Since the dismissal of the indictment is "based upon the invalidity or construction of the statute upon which the indictment . . . is founded," 18 U.S.C. § 3731 requires that

we certify this case to the Supreme Court of the United States. *United States* v. *Waters*, 175 F. 2d 340 (D.C. Cir. 1948).

WHEREFORE IT IS ORDERED that this case be certified to the Supreme Court of the United States.

United States District Court, Southern District of Indiana, Indianapolis Division

UNITED STATES OF AMERICA

v.

PAUL OGLE

NO. IP 68–CR–252

Entry

The matter of the defendant's February 12, 1969 Motion to Dismiss Indictment came on for ruling. The Court, being duly advised in the premises by the defendant's memorandum submitted March 12, 1969 and by the Government's response to the motion filed April 28, 1969, now submits its ruling.

The motion of the defendant is hereby SUSTAINED and the indictment is, therefore, DISMISSED.

The May 19, 1969 decision of the United States Supreme Court in the case of *Leary* v. *United States* —— U.S. ——, 37 LW 4397 supports the defendant's contention that Title 26, United States Code, Sections 4742(a) and 4744(a)(1), as applied to this defendant, deny him his right against self-incrimination, and are, therefore, unconstitutional.

Dated this 23 day of June, 1969.

CALE J. HOLDER,
Judge, United States District Court,
Southern District of Indiana.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES *v.* OGLE

CERTIFIED APPEAL FROM THE UNTED ISTATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 737. Decided March 16, 1970

PER CURIAM.

The judgment of the United States District Court for the Southern District of Indiana disinissing Count 1 of the indictment under 26 U. S. C. § 4742 (a) is reversed and the case is remanded to that court for trial on that count. *Minor* v. *United States*, 396 U. S. 87. The judgment of the same court dismissing Count 2 of the indictment under 26 U. S. C. § 4744 (a)(1) is affirmed.